

Opinion No. [29-24]

November 29, 1929

BY: J. A. MILLER, Assistant Attorney General

TO: Hon. W. B. Walton, District Attorney, Silver City, New Mexico.

CRIMINAL PROCEDURE -- Warrant of arrest based on information and belief.

OPINION

Attention has been given to yours of the 19th inst. in which you raise and discuss somewhat the question of the issuing of warrants of arrest upon information and belief only. You quote section 4428 of the 1915 Codification and chapter 132 of the Session Laws of 1927, giving it as your opinion that chapter 132, by implication, repeals or at least amends section 4428 and that where the justice of the peace places the witness under oath before the issuance of the warrant it is not necessary for the district attorney to approve the affidavit or complaint in writing.

With the general effect of your opinion we are in agreement though we base our opinion probably on a little different line of reasoning.

It is a recognized principle that repeals by implication are not favored and in cases where the legislature has at different times legislated on the same subject without specific reference to repeal or amendment, courts will endeavor to, if possible, give effect to all of such legislation. If the different acts can be read together as one act without conflict, they will be so read.

We find no difficulty in reading section 4428 of the Codification and section 1 of chapter 132, Laws of 1927, as one act in which section 1 of chapter 132 would appear merely as a second proviso in section 4428.

Section 4428 starts out with the proposition that a warrant for the arrest of a person charged with crime shall not be issued on the **official oath** of a prosecuting officer nor upon information and belief **only** of the prosecuting officer or any other person. Before the issuing of a warrant, the court having jurisdiction to issue must have before him an affidavit showing specific facts within the personal knowledge of the affiant. This knowledge, of course, need not be in the nature of direct evidence that the accused actually committed a crime, but it must be a knowledge of specific facts, a belief in which will move the court or justice to issue the warrant. The legislature, however, then interposed a proviso permitting the issuing of the warrant upon affidavits based upon information and belief when such affidavits had been approved in writing by the District Attorney. That is, the affidavits based on information and belief of the affiant rather than upon facts within his personal knowledge must have such probative value as to receive the endorsement in writing of the District Attorney and following that to raise in the mind

of the court a finding of probable cause sufficient to induce him to issue the warrant. Or, Sec. 1, Chap. 132, Laws of 1927. Any judge or justice of the peace before whom complaint is made that a felony has been committed may, without consulting the district attorney, examine the complainant and his witnesses **under oath** and, if he finds probable cause, issue a warrant, etc.

You will note the first provision is for an affidavit which is, I believe, ordinarily held to be a sworn statement in writing. The latter requirement is merely an examination under oath which need not be in writing.

We thus see that there is ample provision for the issuing of a warrant of arrest by a judge or justice of the peace upon affidavits or statements under oath based on information and belief when such affidavits have been approved by the District Attorney or when such statements under oath are made before the judge or justice without reference to the District Attorney. The purpose of the legislation seems to be merely that a person be not arrested and charged with crime on mere suspicion or statement of an irresponsible person, but only after the establishing of facts either within the personal knowledge of one who makes affidavit or upon information and belief under circumstances which lead the district attorney, the judge, or the justice of the peace to a finding that probable cause exists sufficient to justify putting into motion the processes of law.